

OPINION NO. 91

**Re: Request for an advisory opinion in connection with
interest in a private corporation**

This is in response to your letter of November 7, 1979 to this Commission requesting an advisory opinion regarding your private pecuniary interest and as an officer of Company X, hereinafter referred to as "business interest."

We are of the opinion that your duties and responsibilities as a land planner and your business interest in Company X may be incompatible.

Based on your testimony and testimonies of other witnesses, we have established the following facts that:

1. You are an officer and director of Company X, a private corporation established under the laws of the State of Hawaii.
2. The corporation was chartered for income tax purposes for the benefit of your spouse. Your business interest

is minimal since it was incorporated for income tax purposes.

3. Your spouse has a real estate broker's license and has a contract with Company Y, a real estate broker. Consequently, Company X is primarily concerned with the purchase and sale of land.

4. Your duties and responsibilities with the City is primarily as Chief of the General Plan Branch. In short, you are a land planner.

5. You are privy to confidential information regarding proposed land planning because of your duties and responsibilities as Chief of the General Plan Branch.

6. The primary duties and responsibilities place you in a sensitive position because of your specific duties as section chief accepting application for amendments to land ordinances, such as the General Plan, Detailed Land Use Map and proposed Development Plans of certain areas of the City and formulating proposals affecting future land development in this City.

Based on the foregoing facts, we are of the opinion that your business interest may fall within the ambit of the provisions of Revised Charter of Honolulu 1973 [RCH] Sections 11-102.3, 11-102.2 and 11-104. RCH Section 11-102.3 provides that:

No elected or appointed officer or employee shall:

Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of his official duties or which may tend to impair his independence of judgment in the performance of his official duties.

while Section 11-102.2 states that:

No elected or appointed officer or employee shall:

Disclose confidential information gained by reason of his office or position or use such information for the personal gain or benefit of anyone.

and Section 11-104 reads as follows:

No elected or appointed officer or employee shall use his official position to secure or grant special consideration, treatment, advantage, privilege or exemption to himself or any person beyond that which is available to every other person.

You testified that you do have a business interest. Moreover, your duties and responsibilities as Chief of the General Plan Branch, where future land use programs are proposed, and the corporation in which you are active primarily deals with the purchase and sale of land since your spouse has a real estate broker's license prima facie establishes an incompatible situation with the proper discharge of your official duties. That is, you may be placed between the horns of a dilemma. For example, on the one hand you are aware of land planning proposals that have been developed by your section but not made public because they have not been officially approved by your Department head, while on the other hand such information may be of economic value to your spouse as a real estate broker. Under such circumstances your dilemma is whether to divulge such information to your spouse for your private eventual benefit, or to keep it from her based on the public trust which you have a duty to uphold as a City employee. Such dilemma may affect the proper discharge of your official duties or may tend to impair your independence of judgment in the performance of your official duties.

Although you did testify that much of the information which your Department has is available for public scrutiny, other witnesses have testified that there is a time span when such information remains confidential because it is still in the pipeline and has not been authorized to be made part of the public record. Consequently, there may be a difference as to the confidentiality of the status of any material which is processed by your section. However, the fact that you are in a department which primarily deals with land and future development of such land in the City and your business interest are connected with your spouse who deals in the sale and purchase of real estate, are facts which may be reasonably perceived by the public as placing you in a position which may be advantageous to your spouse and may be reflected in a higher economic return for you and your spouse by the disclosure of any confidential information to her.¹

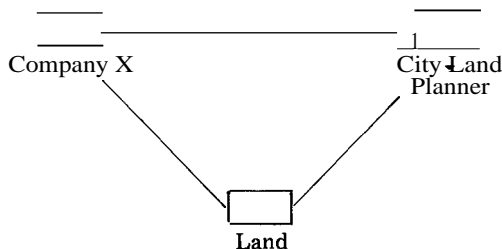
¹ *Should you divulge any confidential information, then you will be violating RCH Section 11-102.2, relating to use of confidential information.*

With reference to RCH Section 11-104, relating to fair and equal treatment, we have no testimony which may be of probative value but due to your duties and responsibilities which relate to land use and your spouse's business and financial activity in land, we may perceive as well as the public that you could use your official position to secure or grant special consideration, treatment, advantage, privilege or exemption to yourself or your spouse or to her real estate broker. For example, your access to confidential information relating to proposed future land use for the City and the divulging of same to your spouse which is not divulged to other real estate brokers.

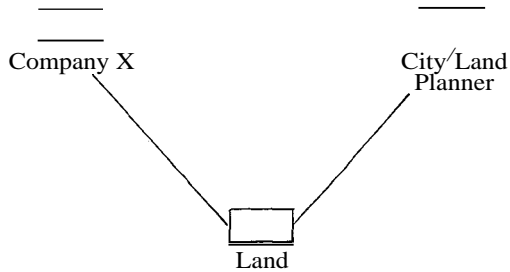
Based on the foregoing, we recommend that you divest your private financial interest and relinquish any office or directorship in Company X. We consider our recommendation to be justified under the circumstances because we have the duty to allay any public perception that you may be taking advantage of your position as a land planner for the City for the benefit of Company X which derives its income from the purchase or sale of land.

Caveat: Please be advised that if your appointing authority permits you to continue without divesting your private financial interest or to continue your business activity, your appointing authority may be charged with violating RCH Section 11-104, relating to fair and equal treatment. Your appointing authority may be subject to such charge by another subordinate in your Department because he or she is not permitted to have a financial interest and a business activity and at the same time employed by the City as a land planner.

In closing, we commend you for submitting your disclosure of your business interest in Company X because such disclosure was in order as there is a conflict of interest. This can be readily shown by diagramming such conflict as follows:



Note the links between the blocks which complete the triangle. If there was no conflict, there will be a gap between two blocks and an incomplete triangle. This can be seen in the following diagram if you resign as an officer and director of Company X:



Dated: Honolulu, Hawaii, March 17, 1980.

ETHICS COMMISSION
Rev. William Smith, Chairman